

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JEROME JUSTICE

Claimant

VS.

GRAHAM SHIP BY TRUCK COMPANY

Respondent

AND

LIBERTY MUTUAL INSURANCE COMPANY

Insurance Carrier

AND

WORKERS COMPENSATION FUND

Docket No. 169,034

ORDER

The Workers Compensation Fund requests review of Administrative Law Judge Steven J. Howard's Award and Order Nunc Pro Tunc dated July 22 and 29, 1994, respectively.

APPEARANCES

The respondent and its insurance carrier appeared by their attorney, Stephanie Warmund of Kansas City, Missouri. The Workers Compensation Fund appeared by its attorney, Eugene C. Riling of Lawrence, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the stipulations of the parties are contained in the Award.

ISSUES

The Administrative Law Judge found the Workers Compensation Fund responsible for the entire cost of and benefits related to this claim. The Workers Compensation Fund requested this review and contends the Fund has no liability in this proceeding. That is the sole issue now before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds:

The Award of the Administrative Law Judge should be affirmed. The respondent has established it is more probably true than not the respondent retained claimant in its employment with knowledge that claimant was physically impaired and handicapped from obtaining or retaining employment. Further, as required by K.S.A. 1991 Supp. 44-567, respondent has proven it is more probably true than not that claimant would not have sustained the subject injury to his low back but for claimant's pre-existing back condition.

The subject injury occurred on June 18, 1992, when claimant lifted a case of cigarettes weighing approximately 40 pounds and twisted to stack it on a pallet. At the time, claimant experienced pain in his low back. Because of the intense pain, claimant was unable to complete his duties and requested permission to see the company doctor. Claimant sought medical treatment and ultimately underwent back surgery in December 1992.

Claimant is a truck driver and has worked for the respondent since 1969. During his employment, claimant has sustained other work-related back injuries. In February 1986, claimant experienced a sharp, piercing pain in his low back while unloading boxes of shoes. At that time claimant's symptoms were so severe he was unable to drive. For that injury claimant was off work for 18 weeks and treated with orthopedic physicians Fred Wood and Roger Hood. In August 1986, claimant reinjured his low back when he was involved in a collision while driving for respondent.

In May 1987, claimant saw board-certified orthopedic surgeon Edward J. Prostic, M.D., who noted claimant had experienced radicular symptoms after the February 1986 incident and that a CAT scan was performed that indicated degenerative changes at multiple levels of the spine. Dr. Prostic notes in his May 1987 report that claimant missed another month from work as a result of the August 1986 accident. As of May 1987, Dr. Prostic believed claimant had sustained a 15% permanent partial impairment of function to the body as a whole due to his low back injury. The record is not clear but it appears claimant received a settlement in the sum of \$13, 700 for one or both of these accidents.

While working for the respondent in June 1988, claimant sustained a third work-related injury involving his low back when he was involved in another collision. In September 1989, claimant again saw Dr. Prostic who noted in his report that claimant had

a CAT scan that indicated diffuse bulging of the L4-L5 disc. Dr. Prostic's report also indicates claimant had radicular pain in his right calf and ankle and intermittent pain in his low back. The doctor also noted claimant continued to have atrophy in his right leg from an S1 radiculopathy. In September 1989, Dr. Prostic believed claimant had sustained a 17.5% permanent partial impairment of function to the body as a whole and should avoid repetitive lifting greater than 35 pounds, single lifts greater than 50 pounds, forceful pushing or pulling and repeated bending or twisting at the waist.

After the accident involved in this claim, Dr. Prostic saw claimant for the third time in April 1993. In his April 1993 report, Dr. Prostic notes that a CAT scan substantiated the diagnosis of herniated disc and that claimant had undergone a laminectomy and discectomy at the L4-L5 intervertebral level. Based on his findings from this third exam, the doctor believes that claimant's permanent functional impairment has increased to 20 to 22.5% to the body as a whole. Dr. Prostic testified that it is unlikely that claimant would have sustained significant injury from the June 1992 incident but for the pre-existing impairment. In a letter to respondent's attorney dated October 26, 1993, Dr. Prostic wrote that ". . . but for the pre-existing disease the impairment sustained in the June 18, 1992 accident would not have occurred."

Board-certified surgeon Charles Clough, M.D., also testified. Dr. Clough first saw claimant in October 1992. Claimant told the doctor about an earlier back injury in 1986 and that he always had some degree of back and right leg pain. After obtaining a myelogram and postmyelogram CAT scan, the doctor performed surgery to remove a herniated disc at the L4-L5 intervertebral level. When questioned by Fund counsel, the doctor testified:

"Q. And we are primarily interested in what past history this man has had being [sic] any effect on the injury of June the 18th, 1992. I'll ask you, do you have an opinion based upon your care and treatment of Mr. Justice and based upon your surgery, your surgical procedures that you performed on him, and the history that you took from him, what relationship, if any, the June 18, 1992, injury played with any prior condition? Do you have an opinion first, sir?

"A. Yes, I have an opinion.

"Q. Would you state that, sir?

"A. In my opinion, on June the 18th, 1992, this man ruptured an intervertebral disc at L4, L5 as demonstrated by his subsequent operative findings. In my opinion, this did not have-- was not a pre-existing condition. I do not feel that the man had a ruptured intervertebral disc prior to his accident or injury of June the 18th, 1992.

"Q. "All right. So the prior condition, in your opinion, played no part in this incident of June the 18th, 1992, as I take your testimony?

"A. That's correct."

Based upon the evidence presented, the Appeals Board finds that respondent retained claimant in its employment with knowledge of three work-related accidents involving low back injury, knowledge that claimant had missed significant time off work

because of those earlier accidents, and knowledge of workers compensation claims and settlements for some of those injuries. In addition, claimant's statements that he experienced ongoing, intermittent symptoms in his low back and right leg prior to the June 1992 accident are buttressed by the testimony of respondent's vice president, George Arnold, who testified he was aware claimant had left work early on several occasions before the June 1992 accident because of problems with his back.

Based upon the entire record, the Appeals Board also finds claimant's low back condition before June 1992 constituted an impairment that was a handicap in obtaining or retaining employment and that claimant's June 1992 accident would not have occurred but for the pre-existing low back impairment. This latter conclusion is based upon the medical testimony of Dr. Prostic. The Appeals Board finds Dr. Clough's opinion is not as convincing as Dr. Prostic's because Dr. Clough did not review the medical records concerning claimant's earlier low back injuries and, therefore, had very limited knowledge of claimant's pre-existing low back condition. The entire extent of Dr. Clough's knowledge of claimant's pre-existing back condition is that claimant told him about a back injury in 1986, that claimant had been followed by Dr. Hood, that he had completed a "work structuring back program," and that claimant had experienced problems off and on. Further, it appears from the above-quoted testimony that Dr. Clough believes it is mandatory that claimant have had a herniated disc at L4-L5 before the June 1992 accident before there would be any relationship between a pre-existing condition and the subject injury.

As required by K.S.A. 1991 Supp. 44-567, the respondent and its insurance carrier have carried their burden in establishing the liability of the Workers Compensation Fund. The conclusion and analysis of the Administrative Law Judge is correct and adopted by the Appeals Board for purposes of this review. In addition, the Appeals Board adopts all the findings, conclusions and orders of the Administrative Law Judge to the extent they are not inconsistent with the findings set forth herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Steven J. Howard dated July 22, 1994 and the Order Nunc Pro Tunc dated July 29, 1994 should be, and hereby are, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephanie Warmund, Kansas City, MO
Eugene C. Riling, Lawrence, KS
Steven J. Howard, Administrative Law Judge
Philip S. Harness, Director